



Jun
30

2020

Page
A001

Clip
resized
87%



Minocqua, The Lakeland Times

"THE VOICE OF THE NORTHWOODS SINCE 1891"

WWW.LAKELANDTIMES.COM

Holmes, attorneys file brief in walking quorum appeal

Attorneys: Bloom's logic flawed and circular

By Richard Moore
OF THE LAKELAND TIMES

Attorneys for the general manager of *The Lakeland Times* and *Northwoods River News* filed their supporting legal arguments last

week in an appeal of a decision by an Oneida County circuit court judge to dismiss an [open-meetings](#) complaint filed against Rhinelander mayor Chris Frederickson and four Rhinelander city council members.

In the complaint, general manager Heather Holmes — and *The Lakeland Times* in a prior complaint — contended that the mayor and council members David Holt, Andrew Larson, Ryan Rossing, and Steve Sauer con-

ducted a series of personal communications, email messages, in-person meetings, and communications leading effectively to the writing and signing of a letter of

See **Appeal**. . . page 7

Jun
30

2020

Page
A007Clip
resized
49%

Appeal

From page 1

reprimand to then city council president George Kirby, all of which amounted to an illegal walking quorum concerning governmental business without public notice.

In the brief filed with the court of appeals this week, attorneys April Rockstead Barker and Tom Kamenick assert that circuit court judge Michael Bloom erred when he dismissed the complaint, arguing that, contrary to Bloom's findings, the council members met for a governmental purpose and that a majority of the board met over a series of smaller meetings, sufficient to take any number of official actions against their colleague, including issuing a letter of reprimand.

In perhaps the most controversial aspect of Bloom's decision, the attorneys contend — again contrary to Bloom's findings — that government business can and does include matters that do not receive or even require a formal vote. In other words, the attorneys argue that informal action on, and discussion about, matters concerning the government body's realm of authority constitute government business as much as matters requiring formal action do.

In his January decision, Bloom found Holmes had failed to allege the council members discussed any governmental business or reached any agreement to take uniform action against Kirby, among other things.

In Bloom's view, government business is not implicated by any discussion of issues that does not ultimately require a formal vote of the subject governing body, including not only a discussion in private of issues not up for a vote but taking informal actions such as writing letters as a quorum of the body.

"The subject letter does not discuss or allude to any potential action that would require the vote of the common council to implement," Bloom wrote in his decision.

The lawsuit stemmed from a Jan. 30 letter signed by Frederickson and the four council members and sent to Kirby. In the letter, the offi-

cials questioned Kirby's leadership, suggesting that he resign "given recent events" and promising a forthcoming conversation that "may be uncomfortable."

The officials also concluded Kirby's conduct at a January council meeting did "not reflect the level of leadership" they were looking for from a seasoned, experienced elected official and suggested that he resign "given recent events."

Holmes filed the complaint in circuit court after Oneida County district attorney Michael Schiek declined to prosecute a similar complaint by *Lakeland Times* and *Northwoods River News* publisher Gregg Walker. Holmes first resubmitted the allegation to Schiek as a verified, or notarized, complaint.

After the district attorney declined for a second time to prosecute, the lawsuit was filed.

Statement of the case

In the brief filed this week, the attorneys argued that allowing government bodies to take informal action in private to avoid taking formal action in public subverts the entire purpose of the open meetings law.

"Public actions must be deliberated and voted on in public unless an express exception applies," the brief asserts.

Over the course of at least seven meetings, the brief states, Larson, Holt, Sauer, Rossing, and Frederickson, acting in their capacities as city council members, discussed Kirby's effectiveness as city council president, possible and actual censure and/or written reprimand of Kirby, and potential future further action against Kirby.

"They came to a decision to jointly send a letter of censure to Kirby, criticizing his behavior as city council president, alleging he was unfit for his position, and suggesting he resign," the brief states. "They prepared the letter and engaged in the discussions about the council president privately in order to avoid taking public action, hoping to keep the matter from the public and avoid a spectacle."

In addition, the brief argues, the number of city council members involved constituted half or more of

the city council, plus the mayor, whose vote is counted in the event of a tie.

"The four defendants who were members of the city council (with or without the mayor) had the ability to determine the council's course of action with respect to any decision to censure or reprimand the council president and constitute a sufficient number to determine whether the council should formally evaluate or investigate the council president's performance," the brief asserts.

Nonetheless, the attorneys contend, the judge made a curious call.

"Despite acknowledging that 'discussing the fitness of the common council's sitting president, as well as discussing how to approach his recent behavior, would seem to qualify as common council business' and that 'the discussions in this case led to an agreement among the defendants to sign and distribute the subject letter to Kirby,' the circuit court concluded that was insufficient to allege a walking quorum violation," the brief states.

In its analysis, Barker and Kamenick continued, the circuit court developed a novel test unsupported by existing case law and contrary to the open meetings law's purpose.

"The court concluded that 'the discussions or activity at an alleged 'meeting' or 'series of gatherings' — a 'walking quorum' — must involve some proposition that will ultimately require a formal vote of the governmental body in order to implement,'" the brief states.

The court then applied its new test to the allegations in the complaint. Among its findings, the court concluded Holmes failed to substantiate the council members discussed any governmental business; or discussed removing Kirby as president; or discussed potential action against Kirby; or reached any agreement to take uniform action against Kirby.

The circuit court also concluded the letter itself was not "uniform action" on "governmental business" because the letter never received a formal vote and did not address any proposition that would require a formal vote.

"The court also concluded that while the letter provocatively suggested Kirby resign from his government position, the suggestion was not 'governmental business,'" the brief stated.

Holmes' argument

In Holmes' brief, the attorneys assert the only real issue in the case is whether the council members' emails and personal meetings qualify as a meeting under the open meetings law.

According to the brief, a "meeting" in the open meetings law is defined as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body."

As such, the brief observed, two elements are necessary to establish an open meetings law violation claim: (1) "there must be a purpose to engage in governmental business, be it discussion, decision or information gathering"; and (2) "the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed."

The "numbers" element can also be established through a "walking quorum" — a series of less-than-quorum-sized meetings where there is an explicit or tacit agreement among a sufficient number of members of a body to control the outcome.

Both prongs of the test were met in this case, the attorneys asserted.

"The council members met for a governmental purpose — discussing the behavior of a colleague in his official position and deciding on a course of action to correct what they saw as misbehavior," the brief states. "And a majority of the board met over a series of smaller meetings, sufficient to take any number of official actions against their colleague, including issuing the letter of reprimand they penned."

One of the crucial issues in the case is the definition of government business as it applies to the open meetings laws.

The brief quotes the state Department of Justice Open Meetings Compliance Guide: "Showers stressed that 'governmental business' refers to

any formal or informal action, including discussion, decision, or information gathering, on matters within the governmental body's realm of authority."

"The Showers case occurred in a different context than here (a single meeting of less than a quorum of a governmental body), but the fundamental point is the same," the brief asserts. "Governmental business should be conducted in public and not behind closed doors. Decisions — even decisions to not take formal action — should be made in formal meetings held in open session."

But was it really government business they were discussing? Kamenick and Barker think so.

"The council members had a governmental purpose in their discussion," the brief states. "They were frustrated with Kirby's behavior at a recent meeting and discussed his behavior and what to do about it. They discussed the letter and its contents. They discussed Kirby's effectiveness as a city alderman. They discussed censoring or reprimanding him in writing. They discussed other potential future action against Kirby. All of their discussion revolved around the behavior of their colleague in his official duties as a city alderman, and what they would do about it, in their official positions as city aldermen."

All those discussions were analogous to what was found to be governmental business in Showers, the attorneys contended.

"The court in Showers found that 'the discussion of the capital and operating budgets' was 'government business,'" the brief stated. "The body's members in that case had met in private 'to move (the) issues along, and to discuss the funding issue 'without political posturing.' No action was taken; rather, 'the purpose of the meeting of the four commissioners was to discuss the pending capital budget.'"

The council members also had a governmental purpose in their letter, the brief asserts, not only addressing an existing dispute between Kirby and then city administrator Daniel Guild and ask-

See **Appeal** . . . page 17